

Appl. No. 09/914,492  
Atty. Docket No. CM2045  
Amdt. dated 03/24/2004  
Reply to Office Action of 9/30/2003  
Customer No. 27752

### REMARKS

1. Kimura et al. US 5690916, Dietz et al. US 6132873 and JP 57098205 A (Pola Abstract) and Bodelin-LeComte

The Examiner has rejected claims 1-3 and 10-17 under 35 USC § 103(a) as being unpatentable over Kimura et al (US 5,690,916) in view of Dietz et al (US 6,132,873) further in light of Pola (JP57098205) and Bodelin-LeComte (US 5,928,652).

The Office Action states "Kimura teaches a skin-color adjusting composition comprising a) 5.0% by weight of titanium coated mica which has transmitted interference green color; b) 9.0% by weight of titanium dioxide treated with silicone; and c) 5.0% by weight of globular nylon powder." In contrast, the instant application discloses and claims topical compositions comprising a) from about 0.05% to about 2.5% by weight of a green, platelet-type interference pigment material having a TiO<sub>2</sub> layer thickness of from 120nm to 160nm; b) from 0% to 3% of an inorganic matting agent which can be silicone coated titanium dioxide; and c) from 0.1% to 10% of a porous organic particulate material.

These three component groups (i.e., "a", "b", and "c" of Kimura and the instant application) are not the same. However, even if the components detailed in subparts "a" and "b" of Kimura were considered identical to the corresponding components "a" and "b" of the instant invention, it would be understood by one of skill in the art that considerably less of these components is required by the compositions of the instant invention. It is widely known in the art that high pigment levels leave a visible residue on the skin, resulting in an artificial appearance and deposition onto the user's clothing. Therefore, higher levels of pigment are not desirable. In addition, high levels of these components result in additional expense. Therefore, in teaching the higher percentages, Kimura teaches away from the lower levels of the instant compositions. Improving performance while reducing material usage is a significant improvement.

As the Office Action states, Kimura does not teach or suggest the use of porous, organic particles. The nylon particles of Kimura are globular nylon particles that are not disclosed as being porous. The present invention composition contains spherical porous, organic particles as now claimed in claim 1. Applicants have determined that the spherical porous, organic powders of the present invention reduce the sticky/tacky feel brought on by the high levels of humectant and the use of niacinamide. The spherical porous powder has a

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ball bearing effect, such that the composition rolls on the skin during application providing a silky smooth feel.

The question then becomes: "What motivation is there in the secondary citations to combine their teachings with that of Kimura add porous resin particles and to reduce the necessary levels of pigments and matting agent?"

Dietz teaches multilayered interference pigments that are useful for a wide variety of applications, including cosmetics. There is no guidance in Dietz of the levels of pigment required by cosmetic applications. Therefore, if one of skill in the art were to use Dietz' interference pigments in the compositions of Kimura, there would be no motivation to vary the levels required by Kimura. The composition resulting from combining the teaching of Kimura and Dietz would still have at least twice the amount of interference pigment and no porous nylon particles. The compositions would not apply smoothly and would result in skin with an artificial appearance.

Pola contains disclosure of spherical organic particles of porous resin. The particle diameters are stated to be 1 to 40 $\mu$ . The majority of examples are pressed powders. The one example of a cosmetic cream utilizes no active ingredient such as niacinamide or high levels of humectant which would result in a sticky or tacky feel in the cream which is reduced by the use of the instant porous particulates. There is no contemplation either of the use of actives with the porous resins or of a reduction in sticky or tacky feel brought about by their use. Additionally, the average particle size of the resin particles used in the cosmetic cream example of Pola is about 3 micrometers. This is outside the range of those resins claimed in the instant application. Further the "make-up emulsion" example contains 21% pigment, also outside the claimed range of the instant application.

Combining the teachings of Kimura with the teachings of Dietz and Pola would not render the Applicants' presently claimed invention obvious. Specifically, the references do not teach or suggest a topical composition containing 0.05% to about 2.5% of interference pigments and 0.1% to 10% of an organic particulate material are porous, organic and spherical and have a refractive index of 1.3 to 1.7. Assuming *arguendo* that one having ordinary skill in the art would combine the disclosures of Kimura, Dietz and Pola, one would still fall short of the Applicants' claimed invention only to arrive at a composition that is applied to the face, leaves too much residue and gives the skin an artificial look, a

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composition that is grainy and abrasive and not smooth during application, and does not match the refractive index of the skin. The references fail to teach or suggest each and every element of Applicants' presently claimed invention.

Bodelin-LeComte discloses a composition which contains organic particulates. However, the compositions of Bodelin-LeComte are in powder form. There is no contemplation of water-in-oil or oil-in-water emulsions in Bodelin-LeComte. Therefore, there would be no motivation provided by a reading of Bodelin-LeComte to include organic particulates in emulsions or dispersions.

2. Kimura et al. US 5690916, Dietz et al. US 6132873 and JP 57098205 A (Pola Abstract) further in view of Mizugushi et al. al (US 5,520,917)

Claims 4-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kimura, Dietz, Pola abstract, and Bodelin-LeComte as applied above, and further in view of Mizugushi et al.(US 5,520,917).

Mizugushi discloses colored particulate materials in the form of almost perfectly spherical fine particles comprising an organic or inorganic pigment coated with a hydrated metal oxide, which can be titanium dioxide.

Substitution of the colored particulate materials of Mizugushi for the anatase form titanium dioxide of claim 4 would not affect the analysis of the non-obviousness of the Kimura/Dietz/Pola/Bodelin-LeComte combinations above. The references alone or in combination fail to teach each and every element of Applicants' present claimed invention.

3. Kimura et al. US 5690916, Dietz et al., US 6132873 and JP 57098205 A (Pola Abstract) in view of Mizugushi et al. al (US 5,520,917) and further in view of Mathur (US4,096240)

The Office Action cites Mathur as the combined references fail to teach niacinamide. Mathur is directed toward the application of a cosmetic composition containing niacinamide from about 0.1% to 10% by weight of the composition and from about 0.1% to 10% by weight of an ultraviolet absorbing sunscreen. The present invention contains from 0.1% to 15% of the active. As mentioned above, Applicants have determined that niacinamide when used in standard formulations gives rise to a sticky feel. The present invention alleviates this negative by using spherical porous organic particulate material with specific properties. Mathur does not disclose or suggest the use of such particles to offset the sticky feel and there is no motivation for one of ordinary skill in the art to combine the teaching of Mathur with

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the previous references to arrive at a composition that alleviates the sticky feel. Specifically, there is never any suggestion or teaching that the incorporation of niacinamide actually causes any sticky feel. Since the cited references fail to teach or suggest the sticky feel cause by the incorporation of niacinamide or the need to alleviate the sticky feel, one of ordinary skill in the art would not be motivated to combine the previous art of record to arrive at the present invention.

Combining the teachings of Mathur with the previously discussed references would not render the present invention obvious. The references alone or in combination fail to teach each and every element of Applicants' presently claimed invention.

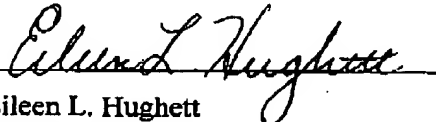
### **CONCLUSION**

In light of the remarks, Applicants respectfully submit that the applied references do not disclose or render obvious Claims 1-8 and 10-17. Accordingly, favorable reconsideration of Claims 1-8 and 10-17 is earnestly solicited in the form of a Notice of Allowance.

Should any issues impeding continuing examination of this Application remain, the Examiner is encouraged to contact the undersigned by telephone at the earliest possible date to achieve a timely resolution.

Respectfully submitted

FOR: T. B. CROOK ET AL.

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